Mataele v Havili

Supreme Court, Nuku'alofa
Ward, CJ
Civil appeal No 258/94

21, 25 July 1994

Bailment - duties of bailee - liability
Damages - valuation - independent evidence - Constitution
Practice & procedure - adjournment - reasons - discretion - need to keep records

The appellant (defendant in court below) appealed inter alia against a magistrate's refusal to adjourn a civil case in the Magistrates Court; and against the judgment then given on two other bases.

Held, allowing the appeal and dealing with those two other bases first:

1. Although no independent evidence of value (of the fine mat in issue) was called, and such should be called, none the less the Magistrate could act properly on the respondents own evidence of value and the evidence the respondent gave of a conversation with the appellant confirming the reasonableness of the value.
2. Clause 1 of the Constitution does not allow a person an unfettered right to place whatever value he or she wishes on goods.
3. That there was a bailment of the mat to the appellant, on the facts and she could be made liable for its loss.
4. But the appeal should succeed and the appellant allowed to put her case because the Magistrate, in his discretion, should have allowed a further adjournment sought on the same grounds (of need for medical treatment) as were earlier found sufficient for an adjournment.
5. Case be remitted for trial de novo.
6. (in passing) There is a need for all Courts to keep records of all steps that occur in court.

Statutes referred to : Constitution, Cl.1
Magistrates Court Act s.14

Counsel for Appellant : Mrs Vaihu
Counsel for Respondent : Mr Fakahua

Judgment

By a writ dated 2 August 1993, the respondent brought a claim against the appellant in the Magistrates' Court as follows:

> "The plaintiff claims from you $1000 which is for the following:
> $450 for the value of the fine mat (Kie Tonga); $50 special damages incurred by way of transportation cost in her effort to retrieve her fine mat; $500 special damages for the hurt, upset and embarrassment suffered as a result of your unlawful action. Claim is also made for $200 Lawyer's Fees, $21.00 Court Fees. Filed in Tongaptapu. Seeking redress".

The case was listed for hearing on 6 August 1993 having been served on the appellant the previous day. However the appellant had arranged to go to the United States of America for medical treatment and left after service and before the hearing.

Application was made for an adjournment by counsel for the appellant and the other side did not object, indeed he would not have been able to do so in view of the terms of the proviso to section 14 of the Magistrates Court Act. The case was adjourned for 2 months when the court was told the appellant was still absent abroad and a further adjournment was give for one month. A similar thing occurred again and at that hearing the magistrate fixed trial for 21 January 1994 stating it was the last adjournment and the trial would proceed on that date whatever the stituation then. Counsel agree he made that decision because of his very proper concern that such a small claim was involving substantial legal fees for repeated adjournments. It is not suggested he was questioning the medical treatment.

On 21 January counsel for the appellant told the court the appellant was still receiving treatment in America but no medical evidence or certificate was produced. In view of the magistrate's previous comments, that was an extraordinary omission by counsel. However, she explained to the lower court that the appellant would undoubtedly return to Tonga after her treatment was completed because her matrimonial home was in Tonga and she had a business here. The magistrate refused the application and the trial proceeded. Counsel for the appellant, properly, remained, cross examined the plaintiff's witnesses and addressed the court.

At the close of the plaintiff's case, she again tried to have the case adjourned but was refused. No evidence was called for the defence and judgment was given for the plaintiff.

Subsequently, the respondent returned and discovered the mat was missing and was told by the appellant it had been lost and the loss had been reported to the police.

There are three grounds of appeal.

> "i. The value or the price of the Kie Tonga was disputed and the plaintiff could not prove the value of the Kie Tonga with an independent witness therefore there should not have been an award.
>
> ii. The plaintiff could not establish any legal relation with the defendant which makes her liable for damage.
>
> iii. If the first two grounds are not accepted then I request for a retrial where I can be present."

The first ground deal with the question of proof of value. The plaintiff told the court $450 was "her own value". No independent evidence was called.

In cases where values of such articles are to be proved, independent evidence should always be called. However, in this case, such an expert could only have given a general range of values for a mat of that size because the mat itself was, of course, lost.

In dealing with his, the magistrate stated:

> "Counsel for the defence has made a submission regarding the cost of the fine mat and an independent witness or somebody else should have come and valued this mat. The court's reply to this submission is that the Constitution provides that Tongans are free to value their own goods."

Counsel told this Court the reference was to the final sentence in Clause 1 of the Constitution.

> "And all men may use their lives and persons and time to acquire and possess property adn to dispose of their labour and the fruit of their hands and to use their own property as they will."

Those fine words are part of the Declaration of Rights and specify the freedom of the individual. To suggest, as the magistrate does, that a person claiming payment for some article lost by another is given an unfettered right by that to name any figure he wishes is manifest nonsense. Had he, instead, considered what, if any evidence there was to support the plaintiff's valuation, the magistrate would have been on firmer ground.

The plaintiff told the court that, when she handed the mat to the appellant, the appellant told her she expected to be able to make some money out of the deal by selling for a higher price. That would seem, if the magistrate accepted it was a true account of the conversation, to confirm that the appellant felt the price was reasonable or, at least, not too high.

His decision was based on his acceptance of the plaintiff's evidence and there was evidence on which he could have decided the value. In the circumstances, this ground of appeal must fail.

The second ground must also fail. The evidence clearly established that the appellant took the respondent's mat and agreed to sell it or return it. Ownership was not passed but she voluntarily took possession of it. There was a bailment to her and she had a duty to preserve it. The loss of the mat made her liable to the respondent.

The third ground refers to the matter of refusal to adjourn the case further. Subject to the proviso to section 14 already referred to, the decision whether or not to allow such an adjournment is entirely within the discretion of the magistrate. As with all discretionary matters, it must be exercised on proper grounds and not whimsically or unreasonably. In this case the magistrate had adjourned a number of times because of the respondent's medical treatment. It is hard to understand why, suddenly, that was no longer considered sufficient.

It is true he had warned the respondent and, in those circumstances, she would have been wise to have a medical report with her. However, there appears to have been no question raised about the genuineness of her medical reasons previously so why should the position change without any further evidence? Similarly, counsel agreed that magistrate stated at the hearing prior to 21 January that the case would proceed whatsoever so counsel might be excused for thinking the decision had already been made.

In the circumstances, I feel the appellant has been wrongly deprived of a chance to put her case and I allow the appeal.

The case is remitted to the magistrates' court for trial de novo by a different magistrate. Costs of the appeal and the court below to be costs in the cause.

I add finally that I have had to rely on counsel's account of the earlier hearings because there is no note of them on the record.

A record must be kept of everything that occurs in court. In a case such as this, the fact of the hearing, the people present, the application and any relevant facts must be briefly recorded. The allowance or refusal of an adjournment is a judicial decision and should always be recorded and, in particular, the special terms added at the hearing prior
160 to 21 January should have been clearly recorded in case of subsequent dispute.